

November 16, 2011

Commissioner Mike Connor
Bureau of Reclamation
1849 C Street NW
Washington DC
20240

Secretary John Laird
California Natural Resources Agency
1416 Ninth Street
Sacramento, CA
95814

Sent via email to: BDO@usbr.gov

Re: The First Amendment to the BDCP MOA

Dear Commissioner Connor and Secretary Laird,

We are writing on behalf of the above environmental and fishing organizations to offer our comments on the “First Amendment to the Memorandum of Agreement (MOA) Regarding Collaboration on the Planning, Preliminary Design and Environmental Compliance For the Delta Habitat Conservation and Conveyance Program in Connection with the Development of the Bay Delta Conservation Plan” (MOA) and the associated federal white paper dated October 27. Thank you for the opportunity to comment on these important documents. We also concur in and support the comments submitted by the Environmental Defense Fund and the Environmental Water Caucus.

We support the existing state requirement that potential water user beneficiaries must pay for planning and other costs related to the BDCP. However, the state and federal mechanism to secure this financing must recognize the co-equal goals that guide Delta management under state (SB 7x1) and federal law (CVPIA.) It must also reflect other obligations with regard to the environment, fisheries and other interests. In its current form, the MOA does not meet these needs.

As discussed in the attached detailed comments, we have many concerns regarding the MOA. In general, we believe that the MOA:

- Inappropriately provides the export water users a wide range of authorities that give this one stakeholder group inappropriate influence over the BDCP process.
- Inappropriately includes substantive commitments regarding the BDCP, with potentially serious impacts on the environment, fisheries and other stakeholders.
- Fails to describe clearly the role of the federal government in the development and implementation of the BDCP.
- Inappropriately includes a BDCP goal that is focused on increasing water exports, rather than a goal of increasing water supply reliability (i.e. reducing physical vulnerability and increasing predictability.)

In its current form, the MOA undermines the effectiveness, balance and credibility of the BDCP process. Since the beginning of the BDCP, export water agencies have had significant influence over the direction of the BDCP, influence which is expanded by the MOA. Indeed, the California State Legislative Analyst’s office testified before the Assembly Water Parks and Wildlife Committee that the MOA “may potentially allow the contractors greater editorial influence over the content of BDCP than for other stakeholders” (LAO testimony, October 19, 2011.) This influence is responsible in significant part for BDCP’s inability, to date, to resolve key substantive issues, to incorporate the best available science and to make progress in a timely fashion. We urge your agencies to withdraw the MOA and renegotiate its terms to address the concerns outlined below.

In general, we urge your agencies to provide greater leadership in the BDCP process and to steer it in a more balanced, productive and science-driven direction. Without significant changes in the current direction of the program and in the terms of the MOA, the BDCP effort is unlikely to succeed.

We look forward to working with you to resolve these concerns.

Sincerely,



Natural Resources Defense Council



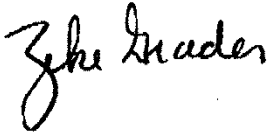
The Bay Institute



Planning and Conservation League



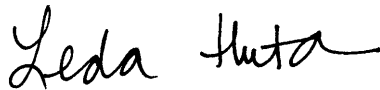
Sierra Club California



Pacific Coast Federation of Fishermen's
Associations



Water4Fish



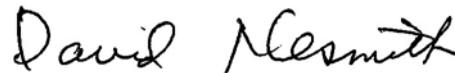
Endangered Species Coalition



Defenders of Wildlife



Northern California Council,
Federation of Fly Fishers



Environmental Water Caucus



California Sportfishing Protection Alliance



American Rivers

SPECIFIC COMMENTS ON THE BDCP MEMORANDUM OF AGREEMENT

General Concerns

The Role of the Bureau of Reclamation. The MOA fails to comprehensively describe the role of the federal agencies with regard to the BDCP. The white paper accurately states that the Bureau intends to use the BDCP to comply with section 7 of the ESA (White Paper, p. 3). Thus, the Bureau anticipates that it will be an applicant and permittee in securing regulatory authorization for implementation of the BDCP. However, the MOA does not describe the role that the Bureau of Reclamation intends to play in ensuring that the BDCP is appropriately prepared as an application under section 7. To the contrary, the federal white paper obscures the Bureau's role by suggesting that the prominent role of the export water agencies in the preparation of the BDCP, provided by the MOA, is consistent with an "applicant-driven process" (White Paper, p. 2). In short, the MOA fails to describe that, under section 7, the Bureau will be a BDCP applicant, in order to ensure CVP compliance with the ESA.

Our concern is heightened as a result of the export water agencies' aggressive litigation in opposition to the federal Delta biological opinions. In that litigation, the export agencies have offered expert witnesses whose work federal agencies have determined not to represent the best available science. In other proceedings, the work of these litigation consultants has also been rejected by the Department of Fish and Game and the State Water Resources Control Board. The MOA provides these export agencies with an opportunity to inject their litigation strategy and litigation consultants into the BDCP process outside of public scrutiny. Indeed, several of the export agencies' litigation consultants are listed as members of the ICF consultant team. Given that the Bureau of Reclamation intends to use the BDCP to apply for federal take permits under section 7, the Bureau must take steps to ensure that the BDCP includes the best available science and the most highly qualified consultant team. We recommend that the MOA be revised to describe the Bureau's role in managing the BDCP effort, as it develops a project designed to comply with section 7 of the ESA.

Public Water Agencies. The MOA refers to a small group of water agencies as the "Public Water Agencies" (Par. I.C.) This definition fails to recognize the many other water agencies with an interest in BDCP issues that are not included in the MOA. Many of these agencies share with the export water agencies identical status under state law. Referring to a few water agencies as the "public water agencies" is also confusing in the context of the beneficiary pays financing requirement. Specifically, benefits to these agencies are not public benefits. We recommend that this term be changed to more accurately describe these agencies, such as by using the term "Export Water Agencies."

Water Supply Reliability. The MOA states that the BDCP's planning goals include to "restore and protect water supply" (Recital H.). This language is excerpted from the planning agreement. That language, however, has been superseded by the requirements of the Delta Reform Act and has been overtaken by events and scientific analysis over the past several years. Today, this language could be read as inappropriately suggesting a focus on "restoring" the quantity of water diverted from the Delta. An emphasis on increasing diversions, rather than

improving reliability (e.g. reducing vulnerability and increasing predictability) is inconsistent with the coequal goals for Delta management under state law. Specifically, this language is inconsistent with the goal of “providing a more reliable water supply for California” (Water Code § 85054). This focus on “restoring” diversion levels is also inconsistent with the requirement under state law to “reduce reliance on the Delta in meeting California’s future water supply needs” (Water Code § 85021.) We recommend that the MOA be revised to accurately characterize the supply related goal of BDCP as improving water supply reliability by reducing physical vulnerability and improving the predictability of Delta supplies.

The MOA provides the export water agencies with preferential access to and influence over the BDCP process.

In general, the access to and influence over the BDCP process granted to the export water agencies in the MOA are inconsistent with the coequal goal requirements of state and federal law. These provisions provide these water users with dramatically more influence over BDCP than other stakeholder groups and agencies that also have legitimate interests in the Delta. The federal white paper suggests that this influence is consistent with their status as Cooperating Agencies under NEPA (White Paper, p. 2). However, we understand that many other cooperating agencies have not been provided with similar commitments regarding influence over the BDCP process. These provisions are inconsistent with a transparent and balanced process. Specific concerns include the following:

Project Management Meetings and Draft Documents. The MOA requires monthly meetings to discuss BDCP-DHCCP management in detail, including scope, direction and work products (Par. II.L). It also requires DWR to provide the export water agencies with “copies of all draft task work orders for any work performed during the BDCP-DHCCP Planning Phase” and “draft ‘Notice-To-Proceed’ agreements” for review and comment (Par. III.C.) State and federal agencies have made no similar commitments to other stakeholders. Any changes to draft consultant products, draft task work orders or other documents, made as a result of export water agency participation in these meetings, would not be visible to the public. The MOA should ensure equal access to all of these documents. We recommend that the MOA be revised to limit management meetings to state and federal agency employees and the consultant team. In the alternative, these meetings should be open to all stakeholders.

Responses to Comments. The MOA provides the export water agencies with a role in state and federal agency efforts to “address all comments received during the PDCP-DHCCP Planning Phase.” (Par. II.K.) State and federal agencies have a responsibility under NEPA and CEQA to respond to comments. It is not appropriate to grant the export water agencies a privileged role in this process. No other stakeholder group or agency has been provided with the ability to influence state and federal responses to comments. We recommend that the MOA be revised to ensure that state and federal agencies will prepare responses to comments without the influence of any stakeholder group.

Stopping Work on the BDCP. The MOA requires DWR to secure “written authorization to proceed” from the export water agencies before beginning work on a public review draft of the

BDCP and EIR/EIS, on the final BDCP and EIS/EIR, and on preliminary engineering, unless alternative funding is secured (Par. 3/G/(b).) Given that state law requires the export agencies to pay the cost of environmental review, planning and design for any new Delta conveyance facility, DWR would likely be precluded from securing financing for the BDCP that did not come from the export water users. Thus, this provision represents a de facto ability to stop all work on the BDCP. The MOA places no limits on this ability to stop the work on the BDCP in terms of time or the reason for the delay. This provision provides the export water agencies with tremendous leverage to secure substantive and other concessions from state and federal agencies. The MOA does not require public notice if the export water agencies choose to delay work on BDCP, nor does it require the public release of the reason for the delay. We recommend that the MOA be revised to delete this ability to stop work on the BDCP.

Consultant Selection. The MOA states that the “(p)arties may retain consulting services as necessary to complete the BDCP-DHCCP Planning Phase” and states that such consultants will be managed by the Director of DWR (Par. II.Q.) This paragraph does not clearly indicate the role of the export water agencies in the selection of consultants. It is not clear from this language if the export water agencies will simply be consulted by the state and federal agencies regarding the selection of consultant, if their agreement is required to hire consultants, or if these water agencies have the independent ability to hire consultants for analysis undertaken by BDCP. No other stakeholder group or agency has been granted a similar role. This concern is heightened by the fact that, as described above, the current BDCP consultant team includes several export agency litigation witnesses. We recommend that the MOA be revised to reserve the role of consultant selection to state and federal agencies.

Project Schedule. The MOA creates a process (Par. II.L) that creates a significant obstacle to necessary adjustments in the BDCP schedule. It is reasonably foreseeable that some agencies or stakeholder groups may request adjustments to the schedule to allow for necessary analysis, comment and discussions. Again, no other stakeholder group or agency has been granted a similar role regarding the BDCP schedule. We recommend that the MOA be revised to state clearly that state and federal agencies will make all final decisions regarding the BDCP schedule and that these agencies will consult with all stakeholder groups regarding such decisions. The MOU should clearly state that the schedule will be revised, as necessary, to ensure comprehensive analysis, opportunity for comments, and the incorporation of the best-available science.

Preparation of the Financing Plan. For years, several of our organizations have encouraged BDCP to address fundamental financing issues. However, the MOA delegates to the export water agencies the preparation of a financing plan for costs related to a conveyance facility (p. 9). This appears to allow these agencies to write a final financing plan with regard to this portion of the program without public input or involvement. This financing plan is also not required to be released until the release of the public draft of the DEIR/DEIS. We believe that an earlier release of a draft financing plan would inform the development of the BDCP and the preparation of the DEIR/DEIS. The MOA does not describe the process for preparing an overall BDCP financing plan.

We recommend that the MOA be revised to require the release of the draft financing plan for the conveyance-related costs of the BDCP, to provide an opportunity for public input. The role of the export agencies in preparing this draft should be to allocate costs among themselves. The MOA should also be revised to indicate that state and federal agencies are responsible for developing specific cost allocations to the export agencies as a group, and for developing proposals for contributions of public funds and from other parties. The MOA should also describe state and federal agency efforts to prepare and release for comment a draft financing plan for the overall BDCP program, including the allocation of costs to the export water agencies.

Contract Administration. The MOA allows the export water agencies to administer BDCP contracts (Par. II.G.) No other stakeholder group or agency has been granted such authority. The MOA does not include any provisions to ensure that such contract administration authority is not used to influence the BDCP process (e.g. the substance of the plan, the conclusions of the consultants or the methodology used.) In combination with the other roles outlined above, this contract administration role provides the export water agencies with significant additional influence over the BDCP program, particularly regarding consultant products. We recommend that the MOA be revised to include clear sideboards to ensure that any contract administration role granted to the export agencies is limited to a strictly administrative role, and that such a role does not increase the export agencies' ability to influence consultant products or the direction of the BDCP program.

The MOA inappropriately includes significant provisions regarding the substance of the BDCP plan.

We appreciate the need for state and federal agencies to secure funding for the BDCP's planning efforts. However, the MOA includes provisions that inappropriately address the substance of the BDCP plan. These provisions extend far beyond financing issues. Our organizations have deep concerns regarding these provisions, which were developed without public input and involvement. Specific concerns include:

Conveyance as a Conservation Measure. The MOA describes Delta conveyance facilities as a conservation measure (Recital R(c).) We oppose designating a Delta conveyance facility as a conservation measure. Such a facility should be considered part of the project. We recommend that recital R(c) be stricken from the MOA.

Section 10 Assurances for Federal Contractors. The MOA states that "(t)he parties agree that an essential element of a successful BDCP is to provide the greatest measure of certainty for the CVP contractors, to the extent allowed by law, that is the equivalent of the assurances that are provided under ESA section 10" (Par. II(J)). The Bureau of Reclamation may not receive section 10 assurances and we believe that the MOA inappropriately commits to achieve the equivalent of section 10 assurances for the federal export contractors "to the extent allowed by law." We believe that these contractors should not be considered BDCP permittees (see related comment) and, therefore, are not eligible to receive section 10 assurances.

This provision could have far-reaching implications. For example, federal agencies, including the Department of the Interior and the Bureau of Reclamation, have a wide range of responsibilities under federal law to protect the environment and consider the needs of other water users. In discharging these responsibilities, federal agencies exercise substantial discretion. This assurances language in the MOA suggests that, should BDCP succeed, signatory federal agencies would commit to exercise this discretion to provide the equivalent of section 10 assurances for CVP contractors “to the extent allowed by law.”

This language appears to establish the equivalent of ESA assurances for CVP contractors as the highest federal priority. Such a commitment could inappropriately constrain the discretion of federal agencies in the future and is inconsistent with the CVPIA, which establishes fish and wildlife protection as a coequal project purpose. This language could interfere with Interior’s discretion in discharging a wide range of federal responsibilities, including, but not limited, to the management of CVPIA (b)(2) water, CVPIA (b)(3) reoperation, refuge water supplies, Trinity River restoration, and the CVPIA Restoration Fund. In addition, this requirement could be used in an effort to force federal agencies to revive the Environmental Water Account, which is still authorized under federal law. This language could be read as suggesting that, in implementing these and other programs, this provision in the MOA would require all federal agency decisions to be designed to provide the equivalent of section 10 assurances for the contractors, unless such a decision would represent a clear legal violation. Thus, this provision could have the effect of changing the standard by which federal agencies make critical management decisions, with potentially negative consequences for the environment, the fishing industry and Delta stakeholders. We recommend that paragraph II.J be deleted from the MOA.

Ecosystem Assurances: The MOA includes commitments regarding water user assurances, but fails to include any provisions designed to ensure the achievement of the program’s ecosystem restoration goal. To the extent that the MOA discusses regulatory assurances for any party, we recommend that the MOA also include a discussion of the state and federal agency commitment to providing equal or stronger assurances designed to ensure the attainment of ecosystem goals.

Permittee Status. The MOA commits state and federal agencies to support listing the export water agencies as “applicants” and “permittees” (Par. II.H.) We believe that this commitment is premature and inappropriate. In particular, the BDCP process has not yet defined the rights and responsibilities of permittees and applicants. Several of our organizations have submitted the attached memo summarizing detailed concerns regarding granting permittee status to the export water agencies. For example, the MOA states that “Public Water Agencies status as permittees would not provide them any new authority over water project operations” (Par. II.H.) However, to the extent that permittee status would provide the export water agencies with influence over BDCP hiring, budget, scientific review, adaptive management and other decisions, permittee status could indeed provide these agencies with substantial influence over decisions that control project operations. We recommend that paragraph II.H be deleted from the MOA.

Att: Memo regarding Permittee Status for Water Contractors in BDCP from EDF, Defenders of Wildlife and NRDC, dated March 23, 2011.